

MAINE HUMAN RIGHTS COMMISSION

51 State House Station
Augusta ME 04333-0051

Patricia E. Ryan
Executive Director

John P. Gause
Commission Counsel

Tel. (207) 624-6050
FAX (207) 624-6063
TTY 1-888-577-6690

www.maine.gov/mhrc

Complainant (Monticello)

v.

Respondent (Houlton)
and Respondent (Old Town)

I. COMPLAINANT'S CHARGE:

Complainant, Complainant, alleges that Respondents subjected him to racial harassment and whistleblower retaliation for complaining about monies being improperly withheld from his paycheck.

II. RESPONDENT'S ANSWER:

Respondents state that it attempted to correct the problems with Complainant's paycheck. Respondent admits that he made an inappropriate statement to Complainant but this was after Complainant had already quit.

III. JURISDICTIONAL DATA:

- 1) Date of alleged discrimination: October 29, 2008.
- 2) Date complaint filed with the Maine Human Rights Commission: December 5, 2008.
- 3) Respondent employed about 50 employees and is subject to the Maine Human Rights Act, Title VII of the Civil Rights Act of 1964, as amended, as well as state and federal employment regulations. Respondent is subject to the Maine Human Rights Act.
- 4) Respondent is represented by Anne-Marie Storey, Esq.
- 5) Investigative methods used: Review of the written materials provided by the parties, fact finding conference.

IV. DEVELOPMENT OF FACTS:

1) The parties and issues in this case are as follows:

- a) The Complainant, Complainant, was hired on about August 25, 2008 to be a crew member at the [] in Houlton, Maine. His last day of work was October 29, 2008. Complainant is multiracial (African-American and Caucasian).
- b) Respondent was the owner/operator of Respondents franchises in Old Town and Houlton, Maine. At the time of these events, Respondent traveled from Old Town to the Houlton restaurant about twice a week. Store Manager (Ms. BU) was the manager of the Houlton restaurant.
- c) Complainant states that Respondents racially harassed him and terminated him on October 29, 2008 for complaining about shortages in his paycheck.
- d) Respondents state that it attempted to correct the problems with Complainant's paycheck. Respondent admits that he made an inappropriate statement to Complainant after Complainant had already quit.

2) The parties provided the following background:

- a) (Complainant) He was 19 years old in 2008. Respondents was his second job. He was hired on August 25, 2008.
- b) (Complainant) When he got his second paycheck (on about September 10), he noticed that he was not paid for some hours he had worked. He and his mother spoke to Respondent about the problem that day. Respondent said that there was a problem with the payroll system and asked him to bring in records of the hours he worked, and he would make sure that Complainant was paid in full in his next paycheck. The problem was not fixed in his next paycheck.
- c) (Mother) She let Complainant try to deal with Respondent about this before she got involved. She spoke to Respondent twice about her son's paycheck. He had a "smarty" attitude and gave her "attitude" but she was stern and "gave it back." She wasn't going to let him mistreat her son.
- d) (Complainant) There continued to be problems with his paycheck and he continued to complain. He was not the only employee with missing hours; other employees also had issues and concerns with their checks.

- e) (Respondent) Complainant was assigned an employee number that had been assigned to a former employee whose employment had terminated. Due to an error, the number did not transfer to Complainant and his hours were not appearing on the electronic record. Store Manager entered his hours manually based on the time he was listed on the schedule but Respondent's actual hours differed from his assigned hours. Also, Respondent did not clock in and out consistently. Complainant's mother brought the problem to Respondent's attention and he told her he would be happy to review his records and compare them to the store's records. He reviewed the records and agreed that Complainant's paycheck was short because he was not taking his unpaid breaks and was working past his scheduled end time. He explained to Complainant about the initial set up problem with the computer and his employee number and issued a check to him on about October 15, 2008.
 - f) (Complainant) Respondent gave him a check for most but not all of the missing hours.
- 3) Complainant provided the following with regard to October 29, 2008, his last day of work:
- a) He arrived at work at 2:00 p.m., knocked on Store Manager's office door, and asked for his paycheck. He was told he would have to wait until he went on break because Respondent had been giving her a hard time about when paychecks got handed out.
 - b) He got to work on the evening bake and when he caught up for the day, he went out front to help. About ten minutes later, Co-worker-JA came in, upset that she did not get her bonus for the last pay period and asked to speak to Respondent. Store Manager said he would be there in a little while. Another Co-worker, JE, was also upset about losing his bonus, because he had bills to pay. They went out and talked awhile and Co-worker-JA was crying.
 - c) Respondent came in and Co-worker-JA went over to speak to him. Respondent told her that her bonus was taken away because she missed a scheduled shift. She explained that she attended her best friend's funeral but Respondent said that it didn't count because she wasn't immediate family. She pleaded with him, crying, and said she needed the money. He seemed aggravated and he left the room without letting her finish. Co-worker-JA left, too, obviously hurt.
 - d) As Respondent left, Complainant asked if he would be coming back later. Respondent said, "Oh, you must have had your bonus taken away too, right, because I think you were late twice this week." Complainant told Respondent he had not gotten his check yet, but he already knew he was missing hours. Respondent asked if Complainant wanted to talk about it right away; Complainant said it could wait until Respondent returned. Respondent left for a meeting off-site with Store Manager.

- e) Two minutes later, an ex-employee ("Ms. Ex") came into the restaurant, sobbing uncontrollably, and said that Respondent had called her a "lazy fat ugly pig" and a "bitch" and called her children "little Indians" and other horrible things. She said she was going to the police. Complainant told her that was the best thing to do and that he (Complainant) would probably be quitting.
- f) His mother came in to get his paycheck so she could deposit it for him. He told her (and his girlfriend, who also stopped by) what was going on. Mother wanted him to come home right away but he told her no, because that would have left Co-worker-W alone in the restaurant.
- g) Supervisor-W got the paycheck for him. They looked it over and sure enough, it was missing the bonus, apparently taken away because he was late twice by only a minute or two. The clock at work runs faster than clocks outside and none of the clocks in the restaurant have the same times either.
- h) Respondent and Store Manager came back at about 8:00 p.m. but Respondent did not come in to discuss the problem with his paycheck. Store Manager said he went home. She was unhappy and upset and said that Respondent had been unpleasant to her. He told Store Manager that this would be his last day of work and that he would call Respondent to tell him that he was quitting.
- i) He got Respondent's cell phone number and tried to call him from the store but he couldn't get through. He clocked out for his break and called Respondent again. He spoke to Respondent, told him he would be quitting and this was his last day. Respondent asked if he had told Store Manager and he said he had. Respondent said that was fine with him, that Complainant was doing a terrible job, that he was immature and didn't know how to work. Complainant reminded Respondent that he had told him (Complainant) several times that he was doing great. Respondent accused him of lying. Complainant told him not to go down that road. He told Respondent he intended to go to the Better Business Bureau and that he would be taking Respondent to court because of the many occasions he had to work through breaks, as did many employees, and that he worked seven days straight with no break because they called him in on his day off. He told Respondent that the way he treated his employees was very cold and very inappropriate and that if he didn't know how to handle employees he didn't deserve to own a business. Respondent responded by calling him an "f--king bastard (or jackass)" and a "no good f--king white nigger." Complainant called Respondent an "f--king jackass (or bastard)" and that he could "rot in hell" and hung up the phone.
- j) Complainant went over to Co-worker-W and told him he was done (quitting).
- k) (Reporting Officer narrative) Complainant went from Respondents to the Houlton police department and reported what had just happened to an officer. The officer's narrative

reads, in part: "Complainant advised that he was an employee of Respondents, owned by Respondent [], and had quit on the day of this report because Respondent had called him a "White Nigger." Complainant stated that he had received his pay check from Respondents and he was being short changed on money. Complainant stated that he spoke to Respondent about the money issue and some other issues and that is when Respondent called him a "no good f--king white nigger."

- l) He did not want to work for Respondents because they did not pay him correctly, because Respondent was a bully and a racist and treats women (e.g., Store Manager) like they're sex objects and beneath him.
- 4) Ms. Ex provided the following:
- a) She quit her job at Respondents because she heard she was going to be fired for missing a shift to visit her husband's grandfather who was in the hospital in Portland. She called in the night before, but that wasn't good enough.
 - b) On the evening of October 29, 2008, she went to Respondents to pick up a check for some missing hours. Her kids were with her. She got out of her car and Respondent approached her. He called her a fat fucking bitch, told her she could not go into the store, and spit on her. He made racist comments about her kids, calling them little Indian bastards. Her 5 year old came over to stand by her and Respondent made an ugly comment about her child having Down syndrome. She got back into her vehicle and he got in his truck. When he left the parking lot, she went into the store. She was upset and crying when she spoke to Complainant.
 - c) Complainant ran out of the store when she told him what happened, trying to see if he could catch up with Respondent, but he had already left.
 - d) Ms. Ex reported this incident to the police and got a temporary restraining order against Respondent.
- 5) Store Manager provided the following:
- a) On the day of this incident, she left the restaurant with Respondent and got in his truck. They saw Ms. Ex in the parking lot and Respondent went over to speak to her. Ex wanted her check fixed that night and Respondent told her he would take care of it. Both of them were yelling. She heard Respondent tell Ms. Ex to stay out of the "f--king store." She did not see him touch her or spit on her, or hear him call her a "lazy fat ugly pig" or a "bitch" or call her children "little Indians."
 - b) Respondent might have yelled at her during her meeting with him that evening. He was constantly doing that. She liked Respondent. He flirted with her and asked her to sit on

his lap several times. She had two miscarriages during the time she worked for him. She liked him even though he owed her money and called her a "useless f—king American."

- c) Complainant had already left the restaurant when she got back from her meeting with Respondent at about 8:00 p.m. Complainant had left two messages on voice mail saying "you need to get your f—king ass" up to the store because he was "walking out." He was mad at Respondent because his paycheck was short and because Respondent had upset Co-worker-JA. (She saw Complainant go around smashing boxes when Co-worker-JA talked about how Respondent had treated her.) Store Manager left at that point, and Supervisor-W stayed through the end of the shift

6) Respondent provided the following:

- a) At about noon on October 29, 2008, Store Manager called to report that a couple of people, including Complainant, were asking questions about their paychecks. When he arrived at the store, Co-worker-JA confronted him about taking her bonus. He took her toward the back of the store for privacy. He didn't know that the funeral was for her best friend. She was upset. He told her he didn't know it was her best friend and that he was sorry. Complainant seemed to be paying attention to this conversation. He resolved the issue with Co-worker-JA by promising to put the bonus in her next paycheck. He did not deal with Complainant's pay issue because Complainant was clocked in and working.
- b) He and Store Manager were heading for a local restaurant for a business meeting. When they got in his truck, Ms. Ex, who had quit, pulled into the parking lot in a van with her family. Store Manager said that Ms. Ex had "created a lot of drama" in the store and that she was probably there to cause more trouble. He intercepted Ms. Ex before she went in and told her he would get back to her about her issue. He told her that Store Manager had said she was creating turmoil. He did not call her names and he did not call her children names. He thought she got in her vehicle and left; apparently she didn't.
- c) During their meeting, he and Store Manager reviewed Complainant's time cards and schedule and did not find any discrepancies. He told her, "You're the manager; you handle it" with Complainant. He dropped Store Manager off at the store at 8:30 or 9:00 p.m.

(Store Manager) denied that Respondent asked her to speak to Complainant about his paycheck. Respondent was supposed to handle it.

- d) Later that date, Respondent received a voice mail message from Supervisor-W informing him that Complainant had just quit and walked off the job, leaving Supervisor-W to handle the store alone.

- e) Half an hour later, Complainant called Respondent. He was very angry, used obscenities, threatened to kick his face and use martial arts, and called Respondent an "f--ing bastard." He (Respondent) got frustrated and lost his temper because Complainant had quit, then called and threatened him. He called Complainant a "white nigger," which he should not have done.
 - f) Ms. Ex did get a restraining order against him. He did not take it seriously. He showed up in court and did not contest it.
- 7) Other evidence of abusive statements made by Respondent and his wife/business partner while terminating employees and when employees quit due to alleged discrimination:
- a) CH said that in 2005-2006, Respondent told her that she was costing him money and that if she had one more doctor's note, he would have to fire her. She said that he said he did not like "disability people" or "welfare people" and refused to complete paperwork that would allow her to get more Social Security benefits. Respondent said he did not want people "like her" around and that on June 1, 2006, when Respondent terminated her employment he said "Get out of here, I'm not running an asylum, go live off welfare." See E06-0366, *Carrie Hinkling v. Tim Hortons*.
 - b) AT said that on about January 10, 2007, Respondent terminated her stating, "Why don't you go on welfare? That's all you goddamn Indians are good for." See E07-0336, *Amber Tompkins v. Coffee Couple, LLC*.
 - c) In July 2007, an employee complained to Respondents, the franchisor, that Mr. Owner made threats and kicked her boyfriend when he went to pick up her last paycheck.
- 8) Miscellaneous:
- a) (Respondent) He has a daughter with Down syndrome and would not make a disparaging comment about someone with that condition.
 - b) (SP) Respondent once said something to the effect of, "[My wife] almost killed our first kid, I'll be f--king damned if she kills this one," referring to their daughter with Down syndrome. He also referred to his wife as a "whore." See *Patti v. Coffee Couple, LLC*, E08-0218.
- 9) Respondent and his wife denied all of the claims against them (except that Respondent admits that he called Complainant a "white nigger.")
- 10) Complainant's mother complained about Respondent to the franchisor, Respondents, on October 30, 2008. After she complained, Respondent called Complainant by telephone and apologized for using the racial slur. Complainant thanked him for calling, and hung up.

Respondent also issued checks to Complainant for shortages he reported (November 6, 2008 - \$38.75, November 25, 2008 - \$39.59).

V. ANALYSIS:

- 1) The Maine Human Rights Act requires the Commission to "conduct such preliminary investigation as is necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S.A. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The Maine Human Rights Act provides that it is unlawful to discriminate in the terms, conditions or privileges of employment or any other matter directly or indirectly related to employment because of race/color or for previous actions that are protected under the Whistleblowers' Protection Act. See 5 M.R.S.A. § 4572(1)(A).
- 3) The Whistleblowers' Protection Act ("WPA"), 26 M.R.S.A. § 833, provides, in part:
 1. Discrimination prohibited. No employer may discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:
 - A. The employee, acting in good faith, or a person on behalf of the employee, reports to the employer or a public body, orally or in writing, what the employee has reasonable cause to believe is a violation of a law or rule adopted under the laws of this State, a political subdivision of this State or the United States. . .
- 4) Here, Complainant, Complainant, alleged that Respondents, Respondent 1 and Respondent, subjected him to racial harassment and whistleblower retaliation for complaining about monies being improperly withheld from his paycheck.
- 5) Respondents state that it attempted to correct the problems with Complainant's paycheck. Respondent admits that he made an inappropriate statement to Complainant after Complainant had already quit.
- 6) For the WPA claim, in order to establish a prima facie case, Complainant must show that he engaged in activity protected by the WPA, he was the subject of adverse employment action, and there was a causal link between the protected activity and the adverse employment action. See *DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514; *Bard v. Bath Iron Works*, 590 A.2d 152, 154 (Me. 1991). One method of proving the causal link is if the adverse job action happens in "close proximity" to the protected conduct. See *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 514-515.

- 7) For the WPA claim, the prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA protected activity. *See Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1st Cir. 1995). Respondent must then "produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse employment action." *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. If Respondent makes that showing, the Complainant must carry her overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse employment action." *Id.*
- 8) For the racial harassment claim, the Maine Human Rights Commission Regulations provide, in part, as follows:

Harassment on the basis of race or color is a violation of Section 4572 of the Maine Human Rights Act. Unwelcome comments, jokes, acts and other verbal or physical conduct of a racial nature constitute racial harassment when:...

- c) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Me. Hum. Rights Comm'n Reg. § 3.09(F) (1) (July 17, 1999).

- 9) "Hostile environment claims involve repeated or intense harassment sufficiently severe or pervasive to create an abusive working environment." *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 23, 824 A.2d 48, 57. In determining whether an actionable hostile work environment claim exists, it is necessary to view "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* (citations omitted). It is not necessary that the inappropriate conduct occur more than once so long as it is severe enough to cause the workplace to become hostile or abusive. *Id.*; *Nadeau v. Rainbow Rugs*, 675 A.2d 973, 976 (Me. 1996). "The standard requires an objectively hostile or abusive environment--one that a reasonable person would find hostile or abusive--as well as the victim's subjective perception that the environment is abusive." *Nadeau*, 675 A.2d at 976.
- 10) The fact that the conduct complained of is unwelcome must be communicated directly or indirectly to the perpetrator of the conduct. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988).
- 11) The MHRC Regulations provide the following standard for determining employer liability for racial harassment committed by a supervisor:

An employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to racial harassment. When the supervisor's harassment culminates in a tangible employment action, such as, but not limited to, discharge, demotion, or undesirable reassignment, liability attaches to the employer regardless of whether the employer knew or should have known of the harassment, and regardless of whether the specific acts complained of were authorized or even forbidden by the employer. When the supervisor's harassment does not culminate in a tangible employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:

- a) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior based on race or color, and
- b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Me. Hum. Rights Comm'n Reg. § 3.09(F) (2) (July 17, 1999).

12) Here, Complainant established a prima facie case of whistleblower retaliation and established that he was subjected to unlawful racial harassment, with reasoning as follows:

- a) Complainant made repeated complaints to Respondents that his paycheck was short and that the Respondents owed him back wages. Complainant reasonably believed that it is unlawful for an employer not to pay an employee for his labor.
- b) Respondents did *not*, as they allege, make a good faith effort to resolve the problem with Complainant's pay. Complainant identified the problem on about September 10, 2008 yet Respondents did not identify the cause of the problem until mid-October and then, failed to resolve by the next pay period. Complainant was only nineteen years old and was in the uncomfortable position of having to address this issue repeatedly with his employer, and of having to rely on his mother for support.
- c) During his shift on October 29, 2008, Complainant announced his intention to quit. He was upset that the Respondents had not fixed the problem with his paycheck and that he was unfairly denied bonus pay. He was upset that Respondents treated other employees unfairly, too, especially Co-worker-JA who was denied her bonus for attending her best friend's funeral. To top it off, he was outraged to hear from Ms. Ex that Respondent had verbally abused her, called her a "bitch" and her children "little Indians." Complainant did not want to work for a racist, sexist employer that mistreated its employees.

- d) Complainant was still an employee when he tried to speak to Respondent about the problems with his latest paycheck. Complainant was expecting to talk to Respondent about the problem when he returned from meeting with Store Manager.¹ Instead, Respondent blew him off and left Houlton without meeting with him in person. It is not believable that Respondent delegated this task to Store Manager.
 - e) The only option left to Complainant was to call Respondent by telephone, and that is what he did. During that telephone call, Complainant blew the whistle again by telling Respondent he was going to take him to court for wage and hour violations, Respondent retaliated against him and subjected him to unlawful racial harassment, by calling him a "no good f—king white nigger."
 - f) Contrary to Respondents' assertion, Complainant had not yet quit when Respondent subjected him to a vile racial slur. He was an employee calling his employer to express his intense dissatisfaction with what he believed were unlawful pay practices and Respondent's mistreatment of him and other employees. It is noteworthy that Complainant reported to the police immediately afterward that he "quit . . . because Respondent called him a "white nigger." Perhaps Complainant would have changed his mind and remained employed if he had reached someone in management who promised to address his concerns and reassured him that the company was committed to fair and nondiscriminatory treatment of its employees. Instead, the vile racial slur Respondent used against Complainant sealed his decision to quit.
 - g) The facts in this case meet the standard for finding that constructive discharge occurred. It is a violation of the Maine Human Rights Act if, although not formally terminated, an employee has no reasonable alternative to resignation because of intolerable working conditions. *See King v. Bangor Federal Credit Union*, 611 A.2d 80, 82 (Me. 1992). "The test is whether a reasonable person facing such unpleasant conditions would feel compelled to resign." *Id.*
- 13) Respondents asserted that Respondent called Complainant a "white nigger" because Complainant quit and then called Respondent and threatened to kick his face. As noted above, (a) Complainant had not yet quit when he called Respondent, (b) it is more likely that Complainant threatened to sue Respondent, not to kick him, which is protected activity under the WPA. In any event, there is no nondiscriminatory reason for an employer to use a vile racial slur against an employee because he is frustrated or angry with the employee.

¹ Respondent states that he did not speak to Mr. Verville about his pay because Mr. Verville was clocked in and working. This is a very odd explanation. This implies that Mr. Verville would have been required to clock out to discuss his pay with his employer.

- 14) Respondents failed to prove the affirmative defense available to an employer who seeks to shield itself from liability for racial harassment, with reasoning as follows:
- a) Respondents did not exercise reasonable care to prevent racial harassment from occurring. Even if Respondent's private beliefs are racist, he has a duty to refrain from expressing his racist sentiments to employees.
 - b) Respondent apologized to Complainant, after he quit and complained to the franchisor, Respondents. Respondent's apology was more likely motivated by a desire to keep his franchise than out of sincere regret for his actions. The apology did not correct the hostile working environment since Complainant's employment had already ended and Respondent did not offer to re-hire him
 - c) Complainant did not unreasonably fail to take advantage of any preventive or corrective opportunities provided by the Respondents.

VI. RECOMMENDATION:

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

- 1) There are **Reasonable Grounds** to believe that the Respondent racially harassed Complainant, and retaliated against him in violation of the Whistleblowers' Protection Act, causing him to quit;
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).

Patricia E. Ryan, Executive Director

Barbara Lelli, Chief Investigator